MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2306

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,
Petitioner,

v.

BOSTON SCHOOL COMMITTEE, ET AL.
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF *AMICUS CURIAE* OF UNIVERSITY CENTERS FOR RATIONAL ALTERNATIVES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Rational Alternatives, Inc.

(1981)

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

University Centers for Rational Alternatives, Inc., ("UCRA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for respondents Boston School Committee, Massachusetts Board and Commissioner of Education, and El Comite des Padres has also been obtained. Consent of the attorney for respondent Tallulah Morgan, et al., was requested but refused. As of this date the attorney for respondent Concerned Black Educators of Boston has failed to respond to our request for consent.

UCRA is an organization of faculty members at public colleges and universities throughout the United States. Its members are joined in commitment to strengthening academic freedom, rational discourse as the best method of education, and individual rights.

UCRA and its affiliate Committee on Academic Non-discrimination and Integrity ("CANI"), through their extended aca-

demic networks of members, have gathered information, analyzed trends, formulated positions, and provided factual materials to numerous government agencies and officials in the pursuit of abolishing discrimination.

In this pursuit the UCRA moves to join the Boston Teachers Union in addressing the issues of individual rights, quality of education and academic freedom from the position that all forms of discrimination are Constitutionally impermissible.

This unique perspective will assist the Court in its assessment of the positions of all parties involved.

Respectfully Submitted,

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QUESTION PRESENTED

Whether it is constitutional and equitable for a United States District Court to make an effort to remedy public school segregation by preserving a numerical racial balance in the faculty solely at the expense of the jobs of individual tenured white teachers?

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BRIEF *AMICUS CURIAE* OF UNIVERSITY CENTERS FOR RATIONAL ALTERNATIVES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The University Centers for Rational Alternatives, Inc. ("UCRA") respectfully submits this brief *Amicus Curiae* in support of the Petition for Writ of Certiorari submitted to this Court by Local 66, Boston Teachers Union, AFT, AFL-CIO, requesting this Court to review the judgment of the United States Court of Appeals for the First Circuit in *Morgan v O'Bryant*, 671 F. 2d 23 (1st Cir., 1982).

INTEREST OF *AMICUS CURIAE*

University Centers for Rational Alternatives Inc. ("UCRA") is an organization of scholars and teachers, faculty members at public and private colleges and universities throughout the United States. A list of UCRA's directors and a partial list of sponsors and members is appended to this brief.

Formed in 1968, UCRA brings together professionals from all disciplines, men and women, black and white, renowned scholars and young teachers entering academic life. They are joined in commitment to rational principles in education and academic freedom.

UCRA, and its affiliate Committee on Academic Nondiscrimination and Integrity ("CANI") stand against racial discrimination. In particular, UCRA and CANI oppose the use of race as a criterion to exclude otherwise qualified individuals from employment and academic position. Representatives of UCRA and CANI have opposed disabilities imposed on individuals on the basis of race in presentations to numerous government agencies and officials, in testimony before Congress, and in *amicus curiae* briefs in such cases as *University of California Regents v Bakke*, 438 U.S. 265 (1978) and *Steelworkers v Weber*, 443 U.S. 193 (1979). UCRA and CANI actively oppose what they view as an erosion of constitutionally guaranteed individual rights, including the right to be free from discrimination based on race or ethnicity or sex.

UCRA joins the Petitioner, Boston Teachers Union, in requesting the Court's review of the instant case in keeping with its committments to education, academic freedom, and individual rights.

STATEMENT OF THE CASE

In 1974, the United States District Court found that Boston public school authorities had knowingly engaged in a policy of racial discrimination and intentionally maintained a dual school

system along racially segregated lines.[1] Among its findings, the District Court determined that school authorities had maintained a dual school system through faculty hiring and assignment policies.[2]

In 1975 the District Court ordered that black and white teachers be hired on a one for one basis until the percentage of black faculty reached 20% and that affirmative recruitment continue until black faculty reached 25%.[3]

In 1978, the District Court found that school authorities had not complied adequately with the hiring quota. The District Court modified the quota, requiring a 1.5% annual increase in black faculty until the 20% quota was attained.[4]

The District Court orders prescribing hiring and recruitment quotas did not contemplate reduction in the Boston teacher force.[5]

In May 1981, the Boston School Committee represented to the District Court that layoffs were necessary and requested approval for layoffs by race to preserve the racial balance attained through seven years of hiring by race. On June 2, 1982 the District Court granted the School Committee's request. The District Court ordered that teacher layoffs "be performed in such a way that the system wide percentage of black teachers will remain at the current level of 19.09%," that "Blacks will receive an absolute preference for recall until a 20% figure is

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[1] *Morgan v. Hennigan*, 379 F. Supp. 410, (D. Mass. 1974); *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974); *cert. denied*, 421 U.S. 963 (1975).

[2] *Morgan v. Hennigan*, 379 F. Supp. at 456–466.

[3] *Morgan v. Kerrigan*, 388 F. Supp. 581 (D. Mass. 1975); *aff'd* 530 F.2d 431 (1st Cir. 1975); *cert. denied*, 426 U.S. 935 (1976).

[4] *Morgan v. McDonough*, unpublished Order on Faculty Recruiting and Hiring (D. Mass., July 5, 1978); Court of Appeals Appendix of Intervenor-Appellant G.

[5] *Morgan v. McDonough*, unpublished Order Regarding Faculty at South Boston High School (D. Mass., August 21, 1981); Court of Appeals Appendix Intervenor-Appellant M. Also, statement of Dist. Ct., transcript of proceeding, May 28, 1981 at 69–70, Court of Appeals Supp. Appendix of Intervenor-Appellant.

reached," and that "once this 20% figure is reached, no fewer than 20% of the teachers subsequently recalled or recruited will be black."[6]

This order resulted in the dismissal of hundreds of tenured white teachers. New black teachers have been employed to maintain the 20% quota while hundreds of experienced tenured white teachers with as many as 19 years of service remain out of work with no hope of recall. No tenured black teachers have lost their jobs.

The United States Court of Appeals for the First Circuit approved the District Court's order, holding that the layoff of tenured white teachers by race did not "unnecessarily trammel" their rights. *Morgan v O'Bryant*, 671 F.2d 23, 28 (1st Cir. 1982).

The Court of Appeals justified the District Court's order as necessary to preserve a "racially balanced" faculty and to provide black adult "role models" for the benefit of black school children. 671 F.2d at 27; Petitioner's Appendix A-11.

UCRA believes that the Court of Appeals is in error. The approval of a quota mandating layoffs by race does indeed unnecessarily trammel the rights of individual teachers to be free of race discrimination in employment.

REASONS FOR GRANTING THE WRIT

The central question before this Court is whether a judicial effort to remedy public school segregation may be at the expense of the jobs of innocent individuals.

It is not questioned that the courts below had broad and flexible powers to address segregation in Boston public schools. But that power is not unlimited. It must be measured against traditional principles of equity. *Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). A court-ordered remedy must be characterized by "basic fairness," *Swann*, 402 U.S. at

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[6] Conditional Order Modifying Faculty Desegregation Orders (June 2, 1981), Petitioner's Appendix A-18.

31, display "facility for adjusting and reconciling public and private needs," *Brown v Board of Education*, 349 U.S. 294, 300 (1955), and achieve "a balancing of the individual and collective interests," *Milliken v Bradley*, 418 U.S. 717, 738 (1974).

And a court-ordered remedy must preserve the constitutional and statutory rights of innocent individuals to be free of discrimination based on an immutable group characteristic—race. U.S. Const. AM V, XIV; 42 USC §§1981, 1983, 2000e.

The "remedy" ordered by the District Court and approved by the Court of Appeals fails to meet these standards. It unjustly and inequitably imposes the burden of rectifying the wrongdoing of the school authorities on a limited group of tenured teachers. It unconstitutionally deprives these individuals of their profession on the basis of race.

A. No school desegregation decision by this Court or any other United States Court of Appeals approves a "remedy" that results in the layoff of innocent teachers by race. There is no precedent for the decision below. To the contrary, it is in conflict with decisions of this Court in employment discrimination cases. In these cases, this Court set limits on remedies which adversely affect innocents.

In *Steelworkers v Weber*, 443 U.S. 193 (1979), this Court approved a voluntary affirmative action plan which did not "unnecessarily trammel the interests of white employees" because "it [did] not result in the discharge of white workers and their replacement with new black hirees". 443 U.S. at 208. The plan in *Weber* was "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." 443 U.S. at 208.

In contrast, the "remedy" in the instant case does result in the discharge of innocent workers by race and the replacement of some by new hirees. And its objective is to preserve a "racially balanced" faculty.

A remedy which adversely affects the interests of innocent workers is tolerable only where necessary to "make whole"

individuals who are identifiable victims of employment discrimination and where there is no "unusual adverse impact" on the innocent workers. *Franks v Bowman Transportation Co.*, 424 U.S. 747 (1976); *International Brotherhood of Teamsters v U.S.*, 431 U.S. 324 (1977).[7]

The Court of Appeals does not seek to justify the racial quota as necessary to make whole identifiable employment discrimination victims. It acknowledges there are none. Still, it approves "drastic relief" at the expense of innocents.

Even where a burden on innocents is justified by the necessity to make whole identifiable victims, traditional equitable principles require a balanced remedy. In *Franks*, the burden of rectifying the employer's wrongdoing is "divided among discriminatee and non-discriminatee employees." 424 U.S. at 777.

Here the burden is not divided. The laid-off white teachers bear the entire burden. These individuals must stand aside, relinquishing their jobs to less senior black teachers and to new hirees "off the street." The black teachers, retained out of seniority order or newly hired, bear none of the burden of the relief; rather they are windfall beneficiaries. The wrongdoer School Committee bears none of the burden. It escapes its contractual obligations and gains a significant financial benefit by gaining court sanction for replacing senior, experienced teachers at the top of the pay scale with teachers who are less experienced and thus lower paid. Here there is no balancing; there is no division. White teachers, innocent of wrongdoing,

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[7] In *Franks*, the majority stated that retroactive competitive seniority relief may not be denied "on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from the facts and circumstances that would not be generally found in Title VII cases." 424 U.S. at 779, n. 41.

Mr. Justice Powell, concurring in part, dissenting in part, joined by Chief Justice Burger and Mr. Justice Rehnquist, characterized retroactive competitive seniority as "drastic relief" which fails to deter wrongdoing employers and which is granted "at the expense of other workers" who are "innocent third parties." *Franks*, 424 U.S. at 787, 789 (Powell, J.). Chief Justice Burger observed that such "relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning." *Franks*, 424 U.S. at 780–81 (Burger, C.J.).

bear the entire burden of the District Court's "remedy" because of their race.

B. The Court of Appeals justifies the District Court's "remedy" as necessary to provide a "racially balanced" faculty and black adult "role models" for the benefit of black students. Not only is this rationale without legal or scientific foundation, it works to the detriment of all Boston school children, black and white.

There is no constitutional right to attend a racially balanced school, to be instructed by a racially balanced faculty or to be taught by racial "role models." *See Swann*, 402 U.S. at 23–25; *Pasadena City Board of Education v Spangler*, 427 U.S. 424, 433–435 (1976).

Nor is there any scientific basis for the need for racial role models in any particular proportion. Indeed, carried to its logical end, the role model theory would justify resegregation of public schools where students may be taught properly only by teachers of their own race. Or sex. Or religion. Or ethnic group.

All school children need teachers who are efficient, sensitive, professionally competent and experienced. School children need teachers who are able to practice their profession in a fair and reasonable work environment, teachers who enjoy the minimal job security and academic freedom provided by a contractual seniority system.

School children do not need teacher insecurity caused by the abrogation of the objective seniority criterion. This infringement upon the freedom to teach erodes the educational environment in public schools.

School children do not need this graphic depiction of Orwellian logic: the way to eradicate race discrimination against black persons is to engage in race discrimination against white persons. Professor Carl Cohen summarized:

> Racial classifications have insidious long-term results: anger and envy flowing from rewards or penalties based on race; solidification of racial barriers and the

> encouragement of racial separatism; inappropriate entry of race into unrelated intellectual or economic matters; the indirect support of condescension and invidious judgments among ethnic groups—in sum, the promotion of all the conditions that produce racial *dis*harmony and racial *dis*integration.

C. Cohen, "Why Racial Preference is Illegal and Immoral"—67 *Commentary* 40, 47 (June 1979).

There is no doubt that many persons have been cruelly deprived of educational opportunity because they are black. The Court of Appeals' adherence to a numerical racial quota, however, has no legal or moral justification when it equally cruelly deprives innocent teachers of employment because they are white.

The role model needed is one who speaks against uncritical acceptance of quotas and simplistic numerical solutions to complex human problems.

> Statistical categories and historic labels may seem real to those inspired by words, but only living flesh-and-blood people can feel joy or pain. Neither the sins nor the sufferings of those now dead are within our power to change. Being honest and honorable with the people living in our own time is more than enough moral challenge, without indulging in illusions about rewriting moral history with numbers and categories.

T. Sowell, "Are Quotas Good For Blacks?" 65 *Commentary* 39, 42 (June 1978).

C. Whether well-intentioned efforts to remedy school segregation justifies preservation of racial balance wholly at the expense of innocent teachers' employment is an issue never addressed by this Court. The Court of Appeals below recognized it as an issue never addressed by any other appellate court, 671 F.2d at 29, Petitioner's Appendix A-13, and an issue of "importance . . . and . . . human impact." 671 F.2d at 26, Petitioner's Appendix A-7.

This question is of importance and immediate significance to the layed off tenured white Boston teachers and thousands of teachers in hundreds of school districts across the country threatened by diminishing enrollment and financial crisis.

The question presented is also of significance to all Americans concerned about equity, the eradication of race discrimination, and the rights of the individual. The racial quota ordered by the District Court and approved by the Court of Appeals, to borrow from Professor Alexander Bickel, *The Morality of Consent*, (1975) 133, is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society."

It warrants review by this Court.

CONCLUSION

For the foregoing reasons, University Centers for Rational Alternatives, Inc. asks this Court to review the decision below.

Respectfully submitted,

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